



OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

# LEGAL BUREAU BULLETIN

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## **SUBJECT: LOCAL LAW 71 – “BIAS-BASED PROFILING” BILL**

### **I. Summary of Local Law 71**

On November 20, 2013 amendments to Administrative Code Section 14-151 went into effect. This legislation, passed by the City Council over the Mayor's veto, is known as the Bias-Based Profiling Bill (“Local Law 71”).

Administrative Code Section 14-151 already prohibited “racial or ethnic profiling,” defined in terms consistent with existing Department policy (Patrol Guide Section 203-25, “Department Policy Prohibiting Racial Profiling”). The new law eliminates the categories of ethnicity and religion, retains the categories of race and national origin, and expands the definition to include the following new “actual or perceived” demographic characteristics: color, creed, age, alienage or citizenship status, gender, sexual orientation, disability or housing status. “Housing status” is separately defined as the character of an individual's residence or lack thereof, for example, use of publicly assisted housing, use of the shelter system, or actual or perceived homelessness.

Under Local Law 71, and consistent with current Department policy and training, officers are prohibited from relying on any of the demographic characteristics described above as the “determinative factor” for initiating law enforcement action against an individual, rather than an individual's behavior or other information that links a person or persons to suspected unlawful activity.

It is important to note that Local Law 71 does not prohibit an officer from considering these demographic factors in deciding whether to initiate law enforcement action. The law prohibits their use as the “determinative factor.” For example, if a radio run from an identified complainant describes a crime suspect by race, sex, clothing description and direction of travel, a person who has those physical characteristics and is traveling in the direction described may be the subject of law enforcement action. There is no violation of Local Law 71 in this circumstance because the suspect's race is not the determinative factor for the law enforcement action. It would be unlawful to stop or otherwise engage that individual if the deciding factor for doing so was that he/she matched only the race of the person described in the radio run.

The new law creates a private right of action for anyone claiming to be the victim of bias-based profiling. Successful plaintiffs may not collect money damages, but may obtain injunctive or declaratory relief, along with attorneys' fees and experts' fees. Liability can be established by showing that an officer intentionally engaged in bias-based profiling and the officer fails to prove that the enforcement action was justified by a factor unrelated to discrimination. It is important to note that General Municipal Law 50-k applies to suits brought under this law and an officer acting within the scope of his/her employment and the discharge of his/her duties will be represented in actions stemming from this law just as the officer would be in any other civil law suit.

In addition Local Law 71 allows claims against the Department, as a "governmental body." The Department is liable under the new law if it has intentionally engaged in bias-based profiling, and fails to prove that the bias-based profiling was necessary to achieve a compelling government interest and was narrowly tailored to achieve that compelling interest.

With respect to the Police Department specifically, the new law makes available to plaintiffs another alternative for establishing liability. The claim of bias-based profiling is established if a Department policy or practice regarding initiation of law enforcement action has had a disparate impact on one of the protected categories listed above, and the Department fails to prove as an affirmative defense that the policy or practice "bears a significant relationship to advancing a significant law enforcement objective or does not contribute to the disparate impact." The plaintiff is not required to prove which one among several policies or practices results in a disparate impact, and the plaintiff can win by producing substantial evidence that an alternative policy or practice with less disparate impact is available, with the Department failing to prove that such alternative policy or practice would not serve the law enforcement objective as well.

Local Law 71 includes a provision stating that the mere existence of a statistical imbalance between the demographic category of the plaintiff and the general population is not enough to establish a prima facie case of disparate impact, unless: the general population is shown to be the relevant pool for comparison; the imbalance is statistically significant; and there is an identifiable policy or practice that allegedly causes the imbalance.

## **II. What Can Members Of The Service Do To Avoid Liability Under The New Law?**

Current Department policy prohibits racial profiling. Under Patrol Guide Section 203-25 ("Department Policy Prohibiting Racial Profiling"):

"Members of the service are reminded that the New York City Police Department is committed both to the impartial enforcement of law and the protection of Constitutional rights. To reinforce these commitments and to ensure all members of the service engage only in constitutionally sound policing practices, the Department prohibits the use of racial profiling in law enforcement actions. Racial profiling is defined as the use of race, color, ethnicity, or national origin as the determinative factor for initiating police action. Members are also reminded that the use of other characteristics such as religion, age, gender, gender identity, or sexual orientation as the determinative factor for taking police action is prohibited."

Patrol Guide Section 203-25, further instructs members of the service as follows:

“All police-initiated enforcement actions, including, but not limited to, arrests, stop and questions, and motor vehicle stops, will be based on the standards required by the Fourth Amendment of the U.S. Constitution, Article I, Section 12 of the New York State Constitution, Administrative Code Section 14-151 and other applicable laws. The law confers on police officers the authority to stop, question, and if warranted, frisk an individual whom a member reasonably suspects has committed, is committing, or is about to commit a felony or Penal Law misdemeanor. Members must be able to articulate the factors which led them to take enforcement action, in particular those factors leading to reasonable suspicion for a stop and question and any subsequent frisk, or probable cause for an arrest.”

As always, it is critically important that officers adhere closely to these standards and demonstrate that probable cause for an arrest or the issuance of a summons existed or reasonable suspicion for a stop was present. Doing so will help to avoid or defeat claims that enforcement action has been taken on the basis of a prohibited demographic characteristic. In addition, it is equally important that officers follow Patrol Guide Section 212-08 and document (write down) the factors that led to the enforcement action taken.

Any questions regarding the new law or whether any specific enforcement initiative may be in conflict with its provisions should be directed to the Legal Bureau at (646) 610-5400.